FILED
MAY 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1618

In The

Supreme Court of the United States

October Term, 1986

Harrison School District No. 1; Terry Humble, Superintendent of Schools, Harrison School District No. 1; Joe Bill Wilson, M.D., Tom Rogers, Cathy Brandt, Bobby Lowe, Robert Kent, D.D.S., Richard Hudson, James Harness, and Janet Clark, Individually and in their Official Capacities as Members of the Board of Education of the Harrison School District No. 1 of Boone County, Arkansas; and Roy Horne and Joyce Lindsey, Individually and as Members of the School Board of the Harrison School District No. 1,

Petitioners,

vs.

Bill Lewis, Ed.D,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

PHILIP E. KAPLAN*
JOANN C. MAXEY
KAPLAN, BREWER & MILLER, P.A.
415 Main Street
Little Rock, Arkansas 72201
(501) 372-0400

Counsel for Respondent

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Eighth Circuit erred in determining that a protest against a proposed reassignment of an individual school teacher in a public school district constituted a matter of "public concern," entitled to protected status under the First Amendment's prohibitions against actions or inactions having the effect of inhibiting a public employee's rights of freedom and speech.

2. Whether the Court of Appeals for the Eighth Circuit erred in disregarding the factual finding of the United States District Court that the alleged speech activities of the plaintiff would have significantly interfered with the efficient and harmonious operation of the local school district's educational program.

A. Whether the Eighth Circuit's decision upholding the jury's factual finding that an effective and harmonious relationship between a school superintendent and principal would not be impossible, following the exercise by the principal of alleged speech activities, severely compromised the position of the school district in connection with the "balancing" test prescribed in *Pickering v. Board of Education*, 391 U.S. 563 (1968).

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
Reasons For Denying The Writ	7
Conclusion	12

TABLE OF AUTHORITIES

Page

CASES:

Bowman v. Pulaski County Special School District, 723 F.2d 640 (8th Cir. 1983) 9

Cashman v. Allied Products, 761 F.2d 1250 (8th Cir. 1985) 12

Connick v. Meyers, 451 U.S. 138, 103 S.Ct. 1684 (1983) 8, 9, 10

Cox v. Dardanelle Public School District, 790 F.2d 668 (8th Cir. 1986) 9

Lewis v. Harrison School District, et al., 805 F.2d 310 (8th Cir. 1986) 2

Lewis v. Harrison School District, 621 F.Supp. 1480 (W.D. Ark. 1985) 2

Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731 (1968) 8, 10, 11

United States v. Johnson, 268 U.S. 220, 227 (1925) 8

STATUTES AND OTHER AUTHORITIES:

United States Constitution, Amendment 1 3

United States Constitution, Fourteenth Amendment, Section 1 3

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 2

No. 86-1618

In The

Supreme Court of the United States

October Term, 1986

Harrison School District No. 1; Terry Humble, Superintendent of Schools, Harrison School District No. 1; Joe Bill Wilson, M.D., Tom Rogers, Cathy Brandt, Bobby Lowe, Robert Kent, D.D.S., Richard Hudson, James Harness, and Janet Clark, Individually and in their Official Capacities as Members of the Board of Education of the Harrison School District No. 1 of Boone County, Arkansas; and Roy Horne and Joyce Lindsey, Individually and as Members of the School Board of the Harrison School District No. 1,

Petitioners,

vs.

Bill Lewis, Ed.D,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Bill Lewis respectfully requests that this Court deny the Petition for Writ of Certiorari seeking to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The district court issued a written opinion in this matter dated November 1, 1985. A copy of the opinion is included in the Appendix, page A-19 of the Petition. It is reported at 621 F.Supp. 1480 (W.D. Ark. 1985). The decision of the United States Court of Appeals is also included in the Appendix, page A-1 of the Petition and is reported at 805 F.2d 310 (8th Cir. 1986). A petition for rehearing was filed and disposed of by entry of an order on January 8, 1987, denying rehearing. A copy of that order is included in the Appendix, page A-18 of the Petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This action alleges a violation of First Amendment rights of freedom of speech pursuant to 42 U.S.C. § 1983. 42 United States Code § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person with the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable

> to the party injured to an action of law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Dec. 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284.)

Amendment 1 of the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance.

Amendment 14 of the United States Constitution, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Respondent Bill Ray Lewis was employed as the principal of Harrison High School from mid-July, 1979, through August 25, 1981. His wife, Judy Lewis, a teacher, was also hired by the Harrison School District in 1979.

In a letter from Terry Humble, Superintendent of Schools, to Judy Lewis dated April 17, 1981, Ms. Lewis

was informed that if he received the resignations he anticipated, he would be transferring Ms. Lewis from the senior high school where she was the head girls' basketball and volleyball coach and English teacher to the junior high school for the following year. There was no prior communication concerning this matter with either Ms. Lewis or Respondent, who was her principal.

Subsequently, Respondent went to Humble's office and expressed concern about the efficacy of transferring one of his best and most popular staff members, Ms. Lewis, and emphasized that it was important for the district to retain teachers and coaches of her caliber whenever possible. The issue was not resolved to Respondent's satisfaction at that meeting, so he wrote a letter to Humble requesting a special board meeting to address the school board, dated April 23, 1981. (T.42-43) A special school board meeting was scheduled for May 12, 1981.

The proposed transfer of Judy Lewis generated substantial public attention, particularly from school patrons and faculty. Between thirty and forty high school senior girls had enrolled for the girls' volleyball team under Ms. Lewis for the 1981-82 academic year, and nearly thirty students had enrolled in German under her for that same academic year. (T.106) Superintendent Humble himself conceded that Ms. Lewis' transfer, as teacher and coach from one school in the district to another, could be a matter of public concern to the patrons of the district. (T.218)

On May 12, 1981, a sizeable crowd of school district patrons, between fifty to seventy-five people, appeared at the meeting. According to the minutes of the meeting, a representative group of eight or nine of the patrons ad-

dressed the school board on Judy Lewis' behalf. After these patrons made statements supportive of Judy Lewis' teaching and coaching abilities and the importance of her remaining at the high school, the Board President acknowledged the remaining citizens as "apparently . . . supportive of Mrs. Lewis, and stated that the board is not firing Judy Lewis, just considering transferring her." (T.51-52)

Respondent then began to read a prepared speech following the patron's remarks. In his speech, Respondent stated at the outset "the proposed transfer of Judy Lewis, high school language arts teacher and girls' volleyball coach, from the high school to the junior high seems to me to violate common sense and will be, I believe, a professional error if allowed to take place." Respondent further stated, "It is my understanding that this proposed transfer and the decision surrounding it involve no communication on the part of the superintendent with the junior high principal, the junior high girls' basketball coach, Judy Lewis, or myself." The Respondent continued to read verbatim from his written text of the speech until he was interrupted by a board member who moved that the Board go into executive session to discuss personnel. (T.52-62) In executive session, the Board members were unanimous in expressing to Lewis their desire that he continue his speech in the private confines of the executive session and those who testified during the trial were clear that had Lewis done so, nothing would have happened.

When the meeting reconvened in open session, a board member announced that the Board was officially reprimanding Respondent for "using this opportunity of a special meeting called at Dr. Lewis' request to discuss a transfer of personnel to personally attack the school board

and the superintendent, and to air his dissatisfaction with the views of the superintendent." (T.69) On May 19, 1981, the school board voted to defer issuance of Respondent's 1981-82 contract. The board had previously voted to renew Respondent's contract for the next school year. On June 26, 1981, Respondent received a letter by certified mail recommending that Respondent's contract for 1981-82 not be renewed. Following receipt of the letter, Respondent was informed that his contract would not be renewed and his position as Principal of Harrison High School would end on July 10, 1981. On July 27, 1981, Respondent requested in writing a hearing in front of the Board with regard to the non-renewal of his position. Respondent was granted a hearing on August 25, 1981, and was terminated immediately after the hearing, by a unanimous vote of the school board. (T.84)

This action was filed in the United States District Court for the Western District of Arkansas, on July 2, 1982, by Bill Lewis, Ed.D., against Terry Humble, the Superintendent of Schools of the Harrison School District No. 1, and each member of the Board of Education of the school district, seeking declaratory and injunctive relief against the defendants for the alleged violation of plaintiff's rights of freedom of speech as guaranteed by the First and Fourteenth Amendments of the United States Constitution. Lewis' claim of protected speech activities are based on the statements he made at the public school board meeting on May 12, 1981.

This case was tried to a jury. The district court submitted certain interrogatories to the jury concerning whether the speech activities asserted by Lewis were constitutionally protected. Two of the interrogatories in-

quired of the jury whether the speech activities constituted a matter of public concern and whether the speech activities would, under the *Pickering* balance test, have interfered with the efficient and harmonious operation of the Harrison School District's educational program.

Because the issues as to the protected nature of speech involved questions of law, the district court independently reviewed the evidence and ultimately rejected some of the jury's findings and adopted others. The district court concurred with the jury that a matter of "current" "legitimate" public concern was not involved but disregarded the jury's finding that Humble and Lewis could work together in the Harrison School District, stating "fair minded" men could not have differed on this issue. (Pet. App. 40) Accordingly, the district court granted judgment for defendants.

Bill Lewis appealed the district court's decision. The Eighth Circuit Court of Appeals reversed the district court's determination holding that, as a matter of law, the subject of the speech involved a matter of public concern and that there was substantial evidence to support the jury's decision that the speech would not have interfered with the harmonious operation of the school.

———o———

REASONS FOR DENYING THE WRIT

The instant case is not one which should be granted certiorari as it does not present any unique legal questions nor does it create a conflict among the circuits or a conflict with prior decisions of this Court. The Petitioners

seek certiorari for the limited purpose of having this Court review *de novo* the record below to determine whether the Eighth Circuit Court of Appeals erred in concluding that the speech of Bill Lewis constituted a matter of "public concern" and whether the Court of Appeals erred in upholding the factual finding of the jury, which was disregarded by the district court: that the alleged speech activities of the Plaintiff would not have interfered with the harmonious operation of the local school district's education program. The Petitioners request would require this Court to conduct a factual review of a lengthy trial record to ascertain whether the record evidence supports the decision of the Court of Appeals. This Court has previously ruled: "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnson,* 268 U.S. 220, 227 (1925).

1. In their Petition for Writ of Certiorari, Petitioners contend that the decision of the Eighth Circuit "is in direct conflict with, and flies totally in the face of, the considerations enunciated by this Court in *Pickering v. Board of Education,* 391 U.S. 563 (1968). (Pet. 8) Nothing could be further from the truth. The Court of Appeal's examination of the instant case strictly adheres to the principles set forth in *Pickering* as well as *Connick v. Myers,* 461 U.S. 139 (1983). At the outset of its opinion, the Eighth Circuit states that "to be protected, speech must pass both the *Connick* and *Pickering* tests." (Pet. App. 6) Correctly holding that under *Connick,* the question of whether Lewis' speech was "protected" is a question of law, 461 U.S. at 148, n. 7, the Eighth Circuit examined the record evidence referring to the *time, place,* and *manner* of Lewis' speech. It examined in considerable detail all

three factors, noting that the "large turnout at the special board meeting," the media attention to the event, and the "substance of the controversy itself" all supported its holding that "Lewis' speech *clearly* involved issues important to the public." (Emphasis added.) (Pet. App. 7)

The petitioner argues that the Eighth Circuit incorrectly relied on an earlier decision, *Cox v. Dardanell Public School District,* 790 F.2d 668 (8th Cir. 1986), to examine the public nature of Lewis' speech. The court's reliance on Cox, however, is fully supported by the record evidence in the instant case and by the controlling legal precedent. In *Cox,* a teacher had expressed criticism of the principal and the district's policy of abandoning ability grouping of students. In holding that the speech in *Cox* was of public concern, the court examined closely whether the "speech" concerned issues unique to the teacher or whether the "speech" concerned "educational theories employed by school administrators." The Court found:

> "[W]e believe that much of Cox's speech directed at the school's personnel policies was not motivated solely by employment concerns, but was legitimate criticism of policies and administration which affected the educational function of the school.

The Eighth Circuit also cited another decision, *Bowman v. Pulaski County Special School District,* 723 F.2d 640, 644 (8th Cir. 1983), in which it had earlier determined that "the question of what constitutes the proper care and education of children is one of the most frequently debated issues in the public forum." (Pet. App. 9) Ultimately, the Eighth Circuit found that the situation in the instant case, which involved educational issues important to the community, was not like the situation in *Connick*

which involved a private personnel dispute of little import to those outside the office. (Pet. App. 9)

The Petitioners request that this Court hold "that, as a matter of law, individual personnel decisions do not constitute matters of public concern." (Pet. 5) This request is much too broad as recognized by this Court in *Connick*. In *Connick*, this Court stated:

> . . . When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, *absent the most unusual circumstances*, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. (Emphasis added).

461 U.S. 139, 147.

2. Only after the Eighth Circuit made its determination that the record below clearly supported a finding that the speech involved was of public concern did it balance the interest of the Harrison School District with the interest of the speaker as required under *Pickering*. (Pet. App. 10) The Petitioners contend that the court of appeals' opinion is "also in total derogation of the basic elements of the balancing test." (Pet. 9) However, the only objection the Petitioners actually identify with the court of appeals' application of the *Pickering* factors concerns the court's rejection of the district court's conclusion that Lewis' speech would have a disrupting effect on the school system "without even so much as a reference to the clearly erroneous standard." (Pet. 10)

On the contrary, the court of appeals discussed fully its basis for rejecting the district court's finding stating

that the district court had committed legal error to disregard the jury's findings in balancing the factors under *Pickering*. (Pet. App. 10) The proper method in evaluating the jury findings was applied by the court of appeals. It was the district court which erred in its refusal to give the necessary deference to the jury's factual finding. The record evidence in the instant case to support the jury findings is substantial.

Petitioners would have this Court give undue weight to the interests of the school district, particularly the puzzling claim that the superintendent and the Respondent could *not* work together, despite the testimony by the superintendent himself that the two administrators could work together. (T.220-221) However, the *Pickering* balancing test requires consideration of various factors, not merely a consideration of the interest of the school district or its fear of potential disruption of the educational process.

The Eighth Circuit correctly concluded, that while *Pickering* requires that the interests of the employer be balanced against those of the speaker, the critical inquiry is "whether these interests (discipline within the school system) justify suppression of Lewis' speech or dismissal of Lewis as principal." (Pet. App. 11) In reaching its decision, the court examined each of the six *Pickering* factors, including the governmental interest in retaining Lewis as principal of Harrison High School, and resolved them in favor of the Respondent. (Pet. App. 11) To grant certiorari in this case would require a factual analysis of the record below, and not any legal issue. It was the Eighth Circuit which corrected the trial court's refusal to con-

sider the public concern issue as a matter of law, and which refused to accord any weight to the jury's factual findings, without any reference to the appropriate standards for reviewing jury findings which have a basis in the record. *Cashman v. Allied Products,* 761 F.2d 1250, (8th Cir. 1985).

———o———

CONCLUSION

Therefore, as the Petition for Writ of Certiorari fails to raise arguments which meet the standard for granting certiorari, it must be denied. Fees and costs should be assessed for opposing the petition.

Respectfully submitted,

PHILIP E. KAPLAN*
JOANN C. MAXEY
KAPLAN, BREWER & MILLER, P.A.
415 Main Street
Little Rock, Arkansas 72201
(501) 372-0400

Counsel for Respondent

**Counsel of Record*